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87-882

SUPREME COURT NUMBER _____

Supreme Court, U.S.
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NOV 23 1987
JOSEPH F. SPANIOL, JR.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WAYNE E. BARNES,

PETITIONER

VS.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THOMAS M. HAAS and
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ATTORNEYS FOR THE PETITIONER

QUESTIONS PRESENTED FOR REVIEW

I. WAS THE PETITIONER'S CONVICTION IN THIS CASE, WHICH WAS TRIED TO THE COURT, OF VIOLATION OF 21 U.S.C. §841 (a) and 21 U.S.C. §846, WHICH WAS BASED UPON HIS CONFESSION THAT THE TRIAL COURT FOUND TO BE SUFFICIENTLY CORROBORATED PRIMARILY BY THE ODOR OF MARIJUANA, WHICH THE TRIAL COURT SUPPRESSED BECAUSE IT WAS THE FRUIT OF A STOP OF THE DEFENDANT'S VEHICLE NOT REASONABLY RELATED IN SCOPE TO THE JUSTIFICATION FOR ITS INITIATION, VIOLATIVE OF THE RULE OF LAW REQUIRING CORROBORATION OF AN ACCUSED'S OUT-OF-COURT CONFESSION? SMITH v. UNITED STATES, 348 U.S. 147, 75 S. Ct. 194, 99 L. Ed. 192 (1954); OPPER v. UNITED STATES, 348 U.S. 84, 75 S.Ct. 158, 99 L. Ed. 101 (1954).

II. WAS THE ADMISSION INTO EVIDENCE OF THE DEFENDANT'S OUT-OF-COURT CONFESSION PLAINLY ERRONEOUS BECAUSE IT WAS THE FRUIT OF A STOP RULED BY THE COURT TO BE VIOLATIVE OF THE FOURTH AMENDMENT BECAUSE NOT REASONABLY RELATED IN SCOPE TO THE JUSTIFICATION FOR ITS INITIATION?

LIST OF PARTIES

The parties to this proceeding are Wayne E. Barnes and the United States of America.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW.	1
LIST OF PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES.	v
OPINIONS DELIVERED IN COURTS BELOW. . .	vi
GROUNDS UPON WHICH SUPREME COURT JURISDICTION IS INVOKED	vi
CONSTITUTIONAL PROVISIONS AND STATUTES.	viii
STATEMENT OF THE CASE	1
ARGUMENT.	13
CONCLUSION.	22
CERTIFICATE OF SERVICE.	23
APPENDIX	A-1

TABLE OF AUTHORITIES

CASES	PAGE
Opper v. United States, 348 U.S. 84 (1954).	i,13,14 18
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)	20
Smith v. United States, 448 U.S. 147 (1954)	i,13,14, 15,18
United States v. Micieli, 594 F.2d 102 (5th Cir. 1979).	15
United States v. Roper, 702 F.2d 954 (11th Cir. 1983)	19
Vogt v. United States, 156 F.2d 318 (5th Cir. 1946)	15
Warzower v. United States, 312 U.S. 342 (1941)	13

CONSTITUTIONAL AND STATUTORY AUTHORITY	
U.S. CONST. Amend. IV	21
21 U.S.C. § 841	viii,1
21 U.S.C. § 846	xi,1
Fed.R.Crim.P., Rule 52.	xi,19

OPINIONS DELIVERED IN COURTS BELOW

The United States District Court For The Southern District of Alabama issued two memorandum opinions which are unpublished and which are reproduced infra in the Appendix.

The United States Court of Appeals For The Eleventh Circuit affirmed the judgment of the District Court without opinion pursuant to Eleventh Circuit Rule 25 and denied rehearing without opinion. See Appendix.

GROUNDS UPON WHICH SUPREME COURT JURISDICTION IS INVOKED

The statutory provision which confers upon this Court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. §1254(1), which permits review by the Supreme Court of cases in the

courts of appeals by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CODE, TITLE 21

§841 Prohibited Acts A

Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 or 845a of this title,

any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug other than a narcotic drug consisting of--

(I) coca leaves;

(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

(III) a substance chemically identical thereto;

(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

(iii) 500 grams or more of phencyclidine (PCP); or

(iv) 5 grams or more of lysergic acid diethylamide (LSD);

such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs,

marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both.

§846 Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 52. Harmless Error and Plain Error.

(b) Plain Error.

Plain errors or defects affecting substantial rights

may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

The defendant was indicted by a federal grand jury in the Southern District of Alabama in a two-count indictment charging unlawful distribution and possession with intent to distribute 135 pounds of marijuana in violation of 21 U.S.C. §841(a)(1) and conspiracy to unlawfully possess with intent to distribute more than 50 kilograms of marijuana in violation of 21 U.S.C. §841(a)(1), a violation of 21 U.S.C. §846 and 18 U.S.C. §2. (R1-1-1,2).

Prior to trial the defense moved to suppress any physical evidence taken from his person or his vehicle by law enforcement agents at or about the time of his arrest on the ground that said evidence was seized in contravention of the defendant's right to be

protected from unreasonable search and seizure. (R1-3-1). The case was consolidated for trial with a codefendant, Robert Martin McGee.

Prior to trial the defendant, through counsel, waived a trial by jury and proceeded to trial on the evidence elicited at the suppression hearing. (R2-8) R1-9-1). In effect, the suppression hearing and the trial on the merits were one and the same as to this defendant. (R2-9).

After the evidence was received, the Court directed counsel to submit briefs on the suppression question, after which the Court granted the defendant's Motion to Suppress. (R1-11-7). [See Memorandum Opinion and Order of the District Court in Appendix].

The Court then directed counsel to submit briefs directed to the question

of whether the defendant's voluntary confession was sufficient to convict him, notwithstanding the Court's suppression of the evidence confiscated during the search. The Court also wanted to know whether the confession had to be supported by independent evidence and, if so, what degree of evidentiary support would be required for a conviction. (R1-12-1).

The Government filed post trial motions seeking to have the Court reconsider its suppression order (R1-16-1), and seeking to reopen the Government's case. (R1-13-1). The record does not disclose any rulings by the Court on these motions.

After receiving briefs from counsel on the confession issue, the Court proceeded to rule that there was sufficient evidence to sustain a verdict of guilty on all counts (R1-19-3), and

entered judgment finding the defendant guilty on both counts. (R1-20-1). [See Appendix]. The Court then sentenced the defendant to a five (5) year suspended sentence and a $1,000.00 fine on Count One, and a ninety (90) day custody sentence on Count Two. (R1-21-2).

The defendant testified for the sole purpose of establishing his standing to object to the search. (R2-17). He testified that he had driven in his truck from Pasadena, Texas, to Mobile, Alabama, on May 10, 1985. He had financed the truck through Ford Motor Credit. (R2-18). He was confronted on May 10, 1985, by D.E.A. agent Gary Carter, who searched the covered area of the truck. (R2-19). The search was conducted without a search warrant. (R2-22).

Mr. Gary Carter, a Drug Enforcement

Administration agent in charge of the agency in Mobile, observed a late model Chrysler parked under a shopping center sign, backed into a parking slot, next to a red late model pick-up truck with a camper shell on the back. (R2-28). Both vehicles bore Texas license plates, and what appeared to be a Latin male was driving the Chrysler, (R2-28). Both vehicles had antennas, and the pick-up had three antennas. Mr. Carter observed "several male subjects" standing around the vehicles which "appeared to have two-way radios". This aroused his suspicion. (R2-28).

He then drove over to a telephone located at a nearby 7-11 store. He noticed the Texas license plates on the front of each vehicle. (R2-29). He has found, since being in Mobile for eighteen (18) months, the Houston,

Texas, area is a "source city" for narcotics in the Mobile area. (R2-29).

The Latin male was sitting in the driver's seat of the Chrysler. (R2-20). Carter ran a record check of the Chrysler. (R2-20). Carter ran a record check of the Chrysler by calling his office and talking to Agent Charlie Park, to whom he gave the description of the vehicle and the license number. (R2-31). The record check turned out negative. (R2-43). A young male was on the phone directly next to his, and he walked directly toward the group of young male adults who were standing around the Chrysler. (R2-32). They all looked in Carter's direction "almost simultaneously". (R2-32). The individual who was on the phone then pointed at Carter, after which all of the males dispersed to different vehicles

in a hurried manner. (R2-32). All exited the parking lot in different directions. (R2-32).

Carter followed the pick-up truck through the shopping center and over to the 7-11 store where he pulled the truck over. (R2-33). The defendant, Wayne W. Barnes, existed the driver's side of the vehicle and walked around to the rear where Carter was. (R2-3). He then asked the passenger, Robert Martin McGee, to exit, and he came to the back of the truck. (R2-34). Carter then received a call from his office, and he asked for assistance, (R2-35), which arrived in ten to fifteen minutes. (R2-36).

Carter then asked the two men what they were doing in Mobile. Barnes first replied that they were working, and when asked what type of work they were

doing, he couldn't give an answer, after which he replied that they were en route to Florida, (R2-37), stopping in Mobile to rest. (R2-58). He detected a "strong odor" of marijuana at that time, (R2-37), standing two or three feet from the vehicle. Carter then retrieved a knife from Barnes after asking if they were armed. (R2-38).

Carter then advised both men of their constitutional rights (R2-39). Barnes then stated that he knew that Carter smelled the marijuana. (R2-41). Barnes was placed in a City of Mobile police patrol car when it arrived, and Carter then sought Barnes' consent to search the vehicle. (R2-41). Barnes maintained that he asked Carter if he had a search warrant, and stated that he would leave if no search warrant could be produced. Carter replied by

telling Barnes to sit on the bumper of the truck and that he would have a search warrant in five minutes. (R2-58,59).

After Barnes told Carter he could search the truck, Carter opened the camper and observed several large garbage bags, a suitcase, and a set of scales. (R2-41). Apprximately 135 pounds of marijuana was seized. (R2-42).

Carter admitted that he stopped the defendant's truck without any prior information on the vehicle or on the individuals but on "suspicion combined with educated curiosity." (R2-45). Carter denied telling the defendants he could get a search warrant. (R2-45,46). Carter had been standing by the truck for three to five minutes before he smelled the odor of marijuana. (R2-49).

Barnes denied giving Carter consent to search the truck at first; but after

Carter refused to let him leave, he gave his consent. (R2-59, 62). Barnes denied that Carter ever said anything about smelling marijuana. (R2-60). The defendants tried to leave, according to Mr. McGee, but Carter said a search warrant was on the way.

THE DEFENDANT'S STATEMENT

After arriving at the scene, Deputy Sheriff David A. Luker advised the defendant of his rights and questioned him. The Court found his statement to be voluntary. (R2-87). Barnes stated to Luker the following: He had agreed to haul 150 pounds of marijuana from Pasadena, Texas, to Mobile. He made the decision with an unidentified source in Pasadena on May 8, 1985, to transport the marijuana to Mobile. (R2-88). He left Texas with another individual on May 9, 1985, and drove to

Mobile with this individual, who accompanied him to help with driving. (R2-88). The defendant met his source of supply in a Holiday Inn parking lot in Mobile, had coffee, then followed his source to another location. (R2-89). His source was in the 1984 Chrysler and they ended up at the shopping center where the arrest later occurred. (R2-90).

A notebook was recovered from the truck, and Luker questioned the defendant about it after he had been advised of his rights. (R2-91). He indicated that the figures in the notebook related to the importation and selling of exotic birds from Mexico, and also to the business of collecting money for certain individuals as a collection agent. (R2-91,92). When asked whether these collections were for narcotic payments, the defendant replied, "I don't know, but it

could be." (R2-92).

ARGUMENT

I. THE PETITIONER'S CONVICTION IN THIS CASE WAS VIOLATIVE OF THE RULE OF LAW REQUIRING CORROBORATION OF AN ACCUSED'S OUT-OF-COURT CONFESSION.

A criminal Defendant may not be convicted based upon his own uncorroborated confession. Opper v. United States, 348 U.S. 84 (1954); Smith v. United States, 348 U.S. 147 (1954); Warzower v. United States, 312 U.S. 342 (1941). The purpose of this rule of law has been stated to be to prevent "errors in convictions based upon untrue confessions alone." Warzower, supra, at 312 U.S. 347. Even though the confession may not be involuntary, "its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation--

whose words may reflect the strain and confusion attending the predicament rather than a clear reflection of his past." Smith, supra, at 348 U.S. 153.

The Court in Smith v. United States, 348 U.S. 84 (1954) and Opper v. United States, stated that the "corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that the Defendant is guilty." Smith, supra, at 348 U.S. 156. The Court in Smith stated that corroboration is necessary for all elements of the offense established by admissions alone but that the corroboration is sufficient if it merely fortifies the truth of the

confession, without independently establishing the crime charged. In other words, "all elements of the offense must be established by independent evidence or corroborated admissions, but one mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused." [citation omitted]. Smith, at 348 U.S. 156.[1/]

This case presents a unique question because the Court, upon motion by the defense, suppressed the contraband which the Defendant was charged with possessing and conspiring to possess. The

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[1/] See also, United States v. Micieli, 594 F.2d 102, 108 (5th Cir. 1979). Vogt v. United States, 156 F.2d 308 (5th Cir. 1946).

Court, neverthess, considered the odor of the contraband as a corroborating element used to convict the Petitioner based upon his out-of-court confession. The Court also considered as a corroborative factor the Petitioner's "testimony at the suppression hearing/non-jury trial." (R1-19-2). A careful review of the record reflects that this "testimony" was the very statement which the Petitioner made to Deputy Luker out of court upon which the Court based its judgment of conviction. In other words, the Court used the odor of the suppressed marijuana plus the out-of-court admission itself to corroborate the admission and based its judgment of conviction thereon. The "corroborative evidence" stated by the district court was that the Petitioner owned the truck in question and lived in Pasadena, Texas (Tr. 18); that he inquired if he was "set up;" 9Tr. 36, 61); that he

smelled marijuana in the truck (Tr. 60,63); that the person in the Chrysler was the source (Tr. 87, 90); that he met the source at the Holiday Inn (Tr. 88); that he agreed "to haul" 150 pounds of marijuana from Texas to Mobile (Tr. 88); that he was paid $5,000.00 for his efforts (Tr. 90); and that another individual rode with him to help with the endeavor. (Tr. 88); (R1-19-2). This information was gleaned from the Petitioner in his out-of-court admission and should not have been used by the district court to corroborate the admission itself.

Had this case been tried to a jury, the jury would have heard no evidence of the presence of the marijuana in the Petitioner's truck, since the Codurt suppressed the contraband. Because the Cosurt considered the odor of the suppressed contraband and the out-of-court statement of the Petitioner itself as corroborating factors of the Petitioner's

out-of-court statement, the evidence which corroborated the confession was insufficient as a matter of law to support a conviction based upon the out-of-court statement. Smith v. United States, 348 U.S. 147 (1954); Opper v. United States, 348 U.S. 84 (1954). The marijuana having been suppressed, it cannot be seriously maintained that the Petitioiner possessed it or conspired to possess it. The Petitioner's out-of-court statement having been used by the district court without sufficient corroborating evidence to support its reliabilty, the judgment of the district court and the judgment of the court of appeals should not stand.

II. THE ADMISSION INTO EVIDENCE OF THE PETITIONER'S VOLUNTARY CONFESSION, WHICH WAS DERIVATIVE OF AN ILLEGAL INVESTIGATIVE STOP, WAS PLAINLY ERRONEOUS.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. Fed.R.Crim.P., Rule 52. There was no formal objection by trial counsel to the admission of the Petitioner's out-of-court statement to the agents of the Government in this case. This statement was clearly the fruit of an investigative stop which the Court found to be illegal because it was not "reasonably related in scope to the justification of its initiation." citing United States v. Roper, 702 F.2d 984, 988 (11th Cir. 1983). [See Appendix, p. A-11, A-12]. Because the Petitioner's confession, as well as the search of his vehicle, was derivative of this illegal investigative stop, the Court

should have likewise suppressed the confession. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Wong Sun v. United States, 371 U.S. 471 (1963). Defense counsel, although making no formal objection to the admission of the confession, made the following statement to the Court at R 2-78): "The evidence is that he admitted that he carried the marijuana here from Texas, yes, sir, and that there were other people involved. If that was an illegal search, the case, confession or not, is to fall.

"Of course, in addition though, the statement she is about to have Mr. Luker testify about came as a direct result of the arrest based on the search. After they illegally searched the vehicle, he was arrested for the contraband in the vehicle. If, in fact, it is an illegal search, the case would be over." . . .

"I think his statement comes because he was illegally stopped and his truck searched,

and as a result of that attempt he had been doing that morning, cooperating, he continued to cooperate later with Mr. Luker. And I didn't plan to have any long, extended hearing on this, that and the other thing as to the statement."

This statement by defense counsel at least brought the problem of the derivative nature of the confession to the attention of the trial judge, although it was not formally objected to on any specific constitutional grounds. As such, the Court should have recognized that the confession was the fruit of the illegal detention of the Petitioner by Agent Carter and should have suppressed the statement. U.S. CONST. Amend. IV.

Because the Court admitted a patently unconstitutional statement of the Petitioner, this was plain error whidh this Court should notice.

CONCLUSION

Because the corroborative evidence was insufficient to support the reliability and truthfulness of the Petitioner's out-of-court statement, and because the statement was admitted, even though derivative of an investigative stop and detention of the Petitioner which the Court found to be illegal, the conviction of this Petitioner and the respective judgments of the United States District Court for the Southern District of Alabama and the United States Court of Appeals for the Eleventh Circuit are due to be reversed.

CHRISTOPHER KNIGHT

CERTIFICATE OF SERVICE

I, Christopher Knight, a member of the bar of this Court, do hereby certify that I have served a true and correct copy of this Petition For A Writ of Certiorari on Honorable Charles Fried, Solicitor General of the United States, by depositing three (3) copies of same in the United States mail at the United States Post Office at 250 Saint Joseph Street, Mobile, Alabama 36602, at approximately 3:00 P.M. on this 13rd day of November, 1987, with sufficient postage affixed thereon to insure first class delivery.

Christopher Knight

CHRISTOPHER KNIGHT

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	Criminal
vs.	)	Case No.
	)	85-0007
WAYNE E. BARNES.	)	

MEMORANDUM OPINION AND ORDER

This matter came on for hearing on August 22, 1985, on the defendant's motion. The court enters the following findings of fact and conclusions of law on the motion.

1. The defendant is a resident of Pasadena, Texas and was the driver of the Ford pick-up truck involved in this proceeding.

2. On May 10, 1985, at approximately 8:20 A.M., while en route to work in an unmarked vehicle, Special Agent Gary Carter (D.E.A., Mobile) observed a 1982 F-150, Ford Supercab pick-up

truck with a camper shell attached to the bed, backed into a parking space at the Crispy Chick Restaurant, located in the 5000 block of Cottage Hill Road at Demetropolis Road in Mobile, Alabama. The truck had tinted comper windows, Texas license plates (Tag No. UG1769), and three antennas.

3. A 1984 Chrysler with Texas tags had backed into the parking space next to the truck. The Chrysler had two antennas, indicating both vehicles were equipped with two-way radios.

4. Several males were standing around the truck and a Latin male sat in the driver's seat of the Chrysler.

5. Based upon 19 years experience with the D.E.A., Special Agent Carter knew that Houston, Texas is a source of narcotics for the Mobile area. Carter had no reason to believe that the

truck in question came from the Houston, Texas vicinity.

6. Special Agent Carter stopped at the 7-11 Store beside the Crispy Chick parking lot to observe the situation and to use a pay telephone, since his car was new and without a radio. Carter called Charlie Parks at the D.E.A. Office and asked him to "run a check" on the Chrysler tag number. While Carter gave Parks a description of the vehicle and the license tag number, another young male talked on the telephone approximately two feet away from Carter.

7. The male subject on the other telephone hung up the receiver and walked over to the Ford truck under Carter's observation, spoke with the male subjects and, after turning in Carter's direction, pointed at him.

8. All of the male subjects under observation hurriedly dispersed to their vehicles and drove away from the parking lot.

9. Special Agent Carter told Parks to call him back when he got the requested information and he hung up the telephone. Carter got into his car and followed the Ford pick-up truck, making a circular pattern. The truck drove toward the 7-11 Store's parking lot, traveling approximately 20 feet down Cottage Hill Road and 40 feet down Demetropolis Road.

10. Carter pulled alongside the truck and displayed his badge to the occupants. The defendant Barnes drove into the 7-11 Store's parking lot, stopping near the telephone previously used by Carter. Barnes exited the cab and walked toward the rear of the truck,

where Carter had stopped. Carter got out of his car and asked the passenger to step out of the truck also; the passenger complied with this request.

11. After Barnes had been advised that Carter was a Special Agent with the D.E.A., Parks called back with the report on the 1984 Chrysler. Answering the telephone, Carter informed Parks about the situation; telling him to send additional Agents for assistance.

12. Returning to Barnes, Carter asked for his I.D. The defendant complied and asked, "What do we do now? Did they set us up?"

13. When Carter asked what he was doing in Mobile, the defendant replied, "We're here working." Shortly thereafter Barnes changed his story and told Carter they were "going to Florida to look for work."

14. At this time, Carter detected an odor he believed to be marijuana. He asked the defendant if he had "any weapons"; Barnes told Carter of a shotgun in the cab and handed him a knife. The shotgun removed from the truck cab proved to be a police riot gun with a barrel 1/4 inch wider in circumference than a standard model and capable of carrying twelve rounds.

15. The defendant told Carter, "You stopped us for a reason, Gary. You know and I know what is going on." Upon hearing this statement Carter advised the defendant of his constitutional rights as contained on D.E.A. Form 13A. Carter did not place Barnes under arrest; the defendant indicated he understood his rights. Barnes disputes this portion of Carter's testimony to the extent that the defendant claims he did not "feel free to leave" because

Carter would not let him do so, and that Carter told him he could "get a search warrant in five minutes."

16. At this moment Barnes said, "I know you can smell the marijuana because I do." (Again the defendant disputes making this remark.) Carter replied he was waiting for assistance. Five minutes later Carter waved down a Mobile Police Officer and placed Barnes in the patrol car. Thereafter Carter sought permission from Barnes to search the truck. The defendant gave Carter his keys to the vehicle.

17. A search revealed approximately 135 pounds of marijuana and scales used for measuring smaller quantities in the bed covered by the camper shell. Subsequently, Carter placed Barnes under arrest.

18. David A. Luker, Mobile County

Sheriff's Department, arrived at the scene, joining Carter, two uniformed Mobile Police officers and the defendant. Upon Carter's request, Luker and a uniformed officer again read Barnes his constitutional rights from the D.E.A. For 13A Card, while the defendant sat in a Mobile police car. The defendant again stated he understood his rights.

19. After transportation to the D.E.A. office in Mobile, Alabama, Barnes stated that he had made the decision to deliver the marijuana to Mobile on May 8, 1985, and he drove overnight on May 9, 1985. Another individual accompanied Barnes to help with the driving. Barnes had contracted to transport the marijuana to Mobile for $5,000.00.

20. Arriving in Mobile in the

early morning hours of May 10, 1985, Barnes met his source of supply in the coffee shop at the Holiday Inn on Highway 90 and Interstate 10. The source instructed Barnes to follow his 1984 Chrysler down the interstate highway. Barnes did so and ultimately stopped in the parking lot where the arrest occurred.

21. A notebook found in the defendant's truck contained a list of names, initials and numbers. Barnes stated that he imported exotic birds from Mexico and that he collected debts from unnamed individuals. He did not say how long he had been involved in the collection business, however, he did state that the debts collected "could be for narcotics."

22. It is well-settled that "the Fourth Amendment protects people, not

places" Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 511, 19 L.Ed.2d 576 (1967), and an individual's reasonable expectation of privacy is not subject to arbitrary governmental intrusion solely at the discretion of the officers in the field. Brown v. Texas, 443 U.S. 417, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979). When confronted with a case involving a stop of an individual by a police officer, the court must not apply the exclusionary rule in a rigid manner. Each case must be judged on the facts involved in each encounter. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 1876, 20 L.Ed. 2d 889 (1968).

23. An investigatory stop must be justified by specific and articulable facts which, taken in their totality, give rise to rational inferences that the person stopped is, or is about

to be engaged in criminal activity. Terry, at 1880; United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 695, 66 L. Ed.2d 621 (L981). If such facts are not present, the stop must be pursuant to "a plan embodying explicit, neutral limitations on the conduct of individual officers." Brown, at 2640. In examining the reasonableness of a stop, the court applies an objective standard: would a reasonable man take the actions of the police officer in the same situation? The stop can not be based on "inarticulate hunches" and subjective good faith on part of the arresting officer is not enough to justify a stop. Terry, at 1880.

24. The court is of the opinion that the investigative stop of the defendant Barnes was not "reasonably related in scope to the justification for its

initiation." United States v. Roper, 702 F.2d 984, 988 (11th Cir. 1983). Based upon the totality of the circumstances, Special Agent Carter did not have a particularized and objective basis for suspecting the defendant Barnes of criminal activity, nor did Special Agent Carter stop the defendant pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. It is not necessary to reach the issue of the constitutionality of the search. Since Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), the law has been that "evidence seized by federal officers in violation of the Fourth Amendment is not admissible at trial in a federal court." Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731, 1738, 14 L.Ed.2d 601 (1965). The

exclusionary rule renders inadmissible primary evidence obtained as a direct result of an illegal search and seizure and evidence discovered to be derivative of an illegal search and seizure. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963). Evidence obtained from the search of the defendant's truck is subject to exclusion. It is, therefore,

ORDERED that the motion to suppress is GRANTED.

DONE this 20th day of September, 1985.

(original signed)
Emmett R. Cox
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)
	)CRIMINAL CASE
vs.	)NO. 85-00072
	)
WAYNE E. BARNES.	)

MEMORANDUM OPINION

On September 30, 1985, the court entered an order (Doc. #11) granting the defendant Wayne E. Barnes' motion to suppress physical evidence taken from the defendant's vehicle (Doc. #2). Having found Mr. Barnes' confession to be voluntary, the court requested that the parties submit briefs on whether a voluntary confession is sufficient to convict the defendant on the charges in the indictment and what degree of independent evidentiary support is required for a conviction (Doc. #12). On October 21, 1985, the defendant filed a

brief on the confession issue (Doc. #17), and on December 31, 1985, the United States filed its brief (Doc. #18). The issue is now ripe for decision.

Standing alone, a voluntary confession that satisfies Fifth Amendment standards is not sufficient to purge the taint of an illegal arrest. Lanier v. South Carolina, _____U.S. _____, 106 S.Ct. 297, 298, _____L.Ed.2d _____(1985). It is "merely a threshold requirement for Fourth Amendment analysis." Id. Independent evidence or corroborated admissions must establish all elements of the offense; however, one method of corroboration is for the extrinsic evidence to bolster the admission and thereby prove the offense through the admission. United States v. Micieli, 594 F.2d 102, 108-09 (5th Cir. 1979). An admission at trial may be used to

prove the truthfulness and reliability of extra-judicial voluntary confessions made after the defendant received a Miranda caution and waived the right to the presence of counsel. United States v. Lehmann, 613 F.2d 130, 133 (1980). Independent observations of government agents may also corroborate voluntary confessions. Id. The confession may be used to "fill in any gaps" in the agent's testimony and the confession may be used to prove some elements of the offense. United States v. White, 493 F.2d 3, 6 (5th Cir. 1974); citing Smith v. United States, 348 U.S. 147, 75 S. Ct. 194, 99 L.Ed. 192 (1954).

In the case at bar, Agent Carter's independent observations made prior to the stop provide extrinsic evidence that is consistent with Mr. Barnes' confession and supports it as a whole. The defendant's testimony at the suppression hearing/non-jury trial (Tr. 8) also corroborates and supports the reliability and

truthfulness of the confession. Mr. Barnes testified that he owned the truck in question and lived in Pasadena, Texas (Tr. 18); that he inquired if he was "set up" (Tr. 36, 61); that he smelled marijuana in the truck (Tr. 60,63); that the person in the Chrysler was his source (Tr. 87, 90); that he met the source at the Holiday Inn (Tr. 89); that he agreed "to haul" 150 pounds of marijuana from Texas to Mobile (Tr. 88); that he was paid $5,000.00 for his efforts (Tr. 90); and that another individual rode with him to help with the endeavor. (Tr. 88).

The court is of the opinion that when the United States' extrinsic evidence is considered along with Mr. Barnes' voluntary confession, there is sufficient evidence to sustain a guilty verdict on all counts. By separate document the court will enter final judgment accordingly.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA

DEFENDANT: WAYNE E. BARNES

DOCKET NO. CR 85-00072

JUNE 24, 1986

WITH COUNSEL CHRISTOPHER KNIGHT FOR

THOMS M. HAAS

Deendant has been convicted as charged of violation of Section 841(a)(1), Title 21, U.S. Code as charged in Count 1 of the indictment and Section 846, Title 21, U.S. code as charged in Count 2 of the indictment.
IT IS ADJUDGED on Count 1 that the imposition of sentence is suspended and the defendant is placed on probation for a period of FIVE (5) YEARS to commence upon the completion of the sentence imposed on Count 2 including any parole time. Terms and conditions of probation are on file in this court.

It is further adjudged on Count 1 that the defendant pay a fine to the United States in the amount of $1,000.00.

The defendant is assessed the amount of

$50.00 as to Count 1 to be paid to the United States pursuant ot the provisions of Section 3013, Title 18, U. S. Code.

It is a special condition of the defendant's probation that he perform 300 hours of community service as & when directed to do so by the U. S. Probation Office.

IT IS ADJUDGED on Count 2 that the defendant is hereby committed to the custody of the Attorney General or his authorized repreeentative for imprisonmewnt for a period of NINETY (90) DAYS.

The defendant is assessed the amount of $50.00 as to Count to be paid to the United States pursuant to the provisions of Section 3013, Title 18, U. S. Code.

The defendant may voluntarily surrender to the institution designated by the Bureau of Prisons and shall voluntarily surrender when informed by the U.S. Marshall's Office as to when & where to surrender, but shall not be requireds to report before July 6, 1986.

June 24, 1986 /original signed/
EMMETT R. COX
U.S. DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-7470

D.C. Docket No. 85-00072

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WAYNE E. BARNES,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Alabama

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June 3, 1987

Before KRAVITCH and EDMONSON, Circuit Judges, and TUTTLE, Senior circuit Judge.

PER CURIAM: AFFIRMED. See Cir. R. 25.

Judgment entered: June 3, 1987
For the Court: Miguel J. Cortez, Clerk

ISSUED AS MANDATE: OCT 06, 1987

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-7470

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WAYNE E. BARNES,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion June 3, 11 Cxir., 1987 ___ F.2d ___).

September 24, 1987

Before KRAVITCH and EDMONDSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/original signed/
Phyllis Kravitch
United States Circuit Judge

Supreme Court, U.S.
FILED
JAN 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-882

In the Supreme Court of the United States

OCTOBER TERM, 1987

WAYNE E. BARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

	Page
Cases:	
Brown v. *Illinois*, 422 U.S. 590 (1975)	4
Lanier v. *South Carolina*, 474 U.S. 25 (1985)	4
Opper v. *United States*, 348 U.S. 84 (1954)	5, 6
Rawlings v. *Kentucky*, 448 U.S. 98 (1980)	4, 5
Simmons v. *United States*, 390 U.S. 377 (1968)	7
Smith v. *United States*, 348 U.S. 147 (1954)	5, 6
United States v. *Davanzo*, 699 F.2d 1097 (11th Cir. 1983)	6
United States v. *Frady*, 456 U.S. 152 (1982)	5
United States v. *Milian-Rodriguez*, 759 F.2d 1558 (11th Cir.), cert. denied, 474 U.S. 845 (1985)	5
United States v. *Pennell*, 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985)	6
United States v. *Young*, 470 U.S. 1 (1985)	5
Warszower v. *United States*, 312 U.S. 342 (1941)	5
Constitution and statutes:	
U.S. Const. Amend. IV	7
21 U.S.C. 841(a)(1)	1
21 U.S.C. 846	1

In the Supreme Court of the United States

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WAYNE E. BARNES, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court committed plain error by admitting his custodial confession into evidence and that, in any event, his confession was not corroborated by independent, admissible evidence.

1. Following a bench trial in the United States District Court for the Southern District of Alabama, petitioner was convicted on one count of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of conspiring to do so, in violation of 21 U.S.C. 846. He was sentenced to 90 days' imprisonment, a consecutive five-year term of probation, and a $1,000 fine. He was also ordered to perform 300 hours of community service.

a. On the morning of May 10, 1985, in Mobile, Alabama, DEA Agent Gary Carter observed two vehicles with Texas license plates parked beside each other in a restaurant parking lot. One of the vehicles was a pickup truck with an enclosure over the truck bed; the other was a

late-model Chrysler. Both vehicles were equipped with two-way radios. Several men, including petitioner, were standing around the truck, and another man was sitting in the driver's seat of the Chrysler (Pet. App. A1-A2).

Aware from his 19 years' experience with the DEA that Texas is a major source of controlled substances in Mobile, Agent Carter stopped in a parking lot next to the restaurant and telephoned the local DEA office to request a computer check of the Chrysler's license plate. While Carter was on the telephone, a young man talking on the telephone next to him hung up the receiver, walked to the pickup truck, spoke to the men standing around it, and then turned in Carter's direction and pointed at him. The men quickly got into the two vehicles and drove out of the restaurant parking lot in opposite directions. Pet. App. A2-A4.

Carter returned to his vehicle and followed the pickup truck for a short distance. He then pulled beside it, displayed his badge, and instructed petitioner, who was driving, to pull over. After petitioner and his passenger got out of the truck, Carter asked petitioner for some identification. Petitioner complied with the request and remarked, "What do we do now? Did they set us up?" Carter detected the odor of marijuana; petitioner then said to Carter, "You stopped us for a reason, Gary. You know and I know what is going on." Carter then advised petitioner of his constitutional rights. Petitioner acknowledged that he understood them and then remarked, "I know you can smell the marijuana because I do." Pet. App. A4-A7.

Five minutes later, while awaiting backup assistance, Carter observed a Mobile police car passing and waved it down. He placed petitioner in the patrol car and asked whether petitioner would consent to a search of the truck. Petitioner consented and handed Carter the keys to the vehicle. In the bed of the pickup, Carter discovered 135 pounds of marijuana and a set of scales. Pet. App. A7-A8.

A few moments later, Carter's backup arrived. That officer again advised petitioner of his constitutional rights. Petitioner indicated again that he understood his rights and agreed to waive them. He then confessed to his participation in a scheme to transport the marijuana from Texas to Mobile. Later, at the local DEA office, he stated that he and an accomplice had driven the marijuana-filled truck from Texas the previous day and night and had agreed to deliver the marijuana in Mobile for $5,000. They arrived early that morning and met their contact, who was driving a 1984 Chrysler, in the parking lot of a local motel. They then followed the contact to the parking lot of the restaurant where Agent Carter first observed them. Pet. App. A8-A9.

b. Before trial, petitioner moved to suppress the marijuana that was seized from his truck, alleging that Agent Carter lacked sufficient cause to stop him. The district court agreed, finding that "[b]ased upon the totality of the circumstances, Special Agent Carter did not have a particularized and objective basis for suspecting [petitioner] of criminal activity" (Pet. App. A12).

Petitioner did not move to exclude his statements to the authorities, including his confession to Agent Carter's backup officer. The district court in any event concluded that petitioner's confession was voluntary and that it was untainted by Agent Carter's earlier unlawful stop (Pet. App. A14-A15). After finding that the confession was corroborated, inter alia, by "Agent Carter's independent observations made prior to the stop" (*id.* at A16), the trial court found petitioner guilty on both counts (*id.* at A17-A18). In an unreported judgment order, the court of appeals affirmed (*id.* at A20).

2. Petitioner contends (Pet. 19-21) that despite his failure to move to suppress his confession, the confession was inadmissible and the trial court committed plain error by failing to grant that relief sua sponte.

The trial court concluded (see Pet. App. A14)—and petitioner does not contest—that his confession was entirely voluntary. Moreover, it was twice preceded by the issuance of *Miranda* warnings. The district court nevertheless recognized, in reliance upon *Lanier* v. *South Carolina*, 474 U.S. 25, 26 (1985), that "[s]tanding alone, a voluntary confession that satisfies Fifth Amendment standards is not sufficient to purge the taint of an illegal arrest" (Pet. App. A15). Instead, such a confession must additionally be untainted by the unlawful detention. *E.g.*, *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975). The district court held that the confession in this case was not tainted.

In *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), the Court upheld the admission of incriminating statements that, as here, followed closely on the heels of an assertedly unlawful detention. There, as here, "petitioner received *Miranda* warnings only moments before he made his incriminating statements," a factor this Court deemed to be "important, although not dispositive, in determining whether the statements at issue were obtained by exploitation of an illegal detention" (448 U.S. at 107). In addition, here, as in *Rawlings*, "circumstances intervened between the initial detention and the challenged statements" that attenuated any taint from the detention (*id.* at 108-109). In *Rawlings*, the intervening circumstance of note was the discovery by police of drugs in the defendant's girlfriend's purse, prompting admissions this Court concluded were "spontaneous reactions" and thus the product "of free will unaffected by the initial illegality" (*id.* at 108 (citation omitted)). Here, petitioner's confession was prompted not by his detention but primarily by the realization that Agent Carter was able to smell the marijuana in his truck (Pet. App. A7). As in *Rawlings*, moreover, the assertedly unlawful detention in this case was neither purposefully nor flagrantly improper (see 448 U.S. at 109-110). And, as

in *Rawlings*, in this case "the relatively short period of time that elapsed between the initiation of the detention and petitioner's admissions" (*id.* at 108) did not undercut petitioner's free will. In *Rawlings*, the atmosphere existing during the period of the detention was "congenial" (*ibid.*); here, petitioner's remarks to Carter at the time of the stop show he was not in the least intimidated by the detention. Thus, no compulsion to speak arose "from the circumstances of [petitioner's] arrest." *United States* v. *Milian-Rodriguez*, 759 F.2d 1558, 1565 (11th Cir.), cert. denied, 474 U.S. 845 (1985). The district court did not err in admitting petitioner's confession.

Even assuming that the admission of the confession was erroneous, it was not plain error. As this Court recently stated in *United States* v. *Young*, 470 U.S. 1 (1985), "the plain-error exception * * * is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " 470 U.S. at 15 (quoting *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982)). It is undisputed that petitioner's confession was voluntary. There is, moreover, no doubt as to its truthfulness. This being so, its admission plainly did not result in a "miscarriage of justice." *Young*, 470 U.S. at 15.

3. Petitioner further asserts (Pet. 13-18) that he was convicted on the basis of a confession that was not corroborated by any admissible evidence. That, he claims, runs contrary to the well-settled rule that a conviction must rest upon firmer ground than the uncorroborated confession of an accused. *E.g.*, *Opper* v. *United States*, 348 U.S. 84, 89-92 (1954); *Smith* v. *United States*, 348 U.S. 147, 153-154 (1954). The district court, however, correctly held that petitioner's confession was adequately corroborated.

This Court has recognized that "[t]he rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone." *Warszower* v. *United States*, 312 U.S. 342, 347 (1941). It is, however, equally well es-

tablished that "the corroborative evidence [itself] does not have to prove the offense beyond a reasonable doubt" (*Smith*, 348 U.S. at 156). Instead, while "[a]ll elements of the offense must be established [either] by independent evidence or corroborated admissions, * * * one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused" (*ibid.*). Evidence independent of a confession, in short, is sufficient to sustain a conviction as long as it establishes the trustworthiness of the confession. *Opper* 348 U.S. at 93; accord *United States* v. *Davanzo*, 699 F.2d 1097, 1101 (11th Cir. 1983); *United States* v. *Pennell*, 737 F.2d 521, 537 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985).

In this case, there was evidence independent of petitioner's confession that bolstered its truthfulness. As the district court noted, "Agent Carter's independent observations made prior to the stop * * * [are] consistent with [petitioner's] confession and support[] it as a whole" (Pet. App. A16). Petitioner confessed that he traveled from Texas with a truck filled with marijuana, that he agreed to deliver it to a contact in Mobile, and that he met his contact, who drove a Chrysler, early on the morning of his arrest (*id.* at A8-A9). Before stopping petitioner, Agent Carter observed him driving a pickup truck with Texas license plates and meeting with at least one other person in a 1984 Chrysler. Both observations are entirely consistent with petitioner's confession. The trustworthiness of petitioner's confession is further bolstered by the fact that a colleague of petitioner's felt compelled to warn his confederates that Carter was investigating them, prompting their immediate departure from the scene in different directions. In addition, as the district court noted (*id.* at A16-A17), petitioner's custodial confession is corroborated by his later, in-court admissions that he lived

in Texas and owned the truck in question, as well as his admission that he was able to smell the hidden marijuana following his stop. * Finally, because the corroboration requirement is designed to ensure the reliability of the conviction, there is no need to ignore the corroborative effect of the evidence seized from petitioner's truck, even though that evidence was suppressed at trial. The suppression of that evidence served the deterrent purposes of the exclusionary rule. The corroboration rule, however, serves a very different purpose—to ensure that the confession was reliable. The suppressed evidence provided a complete answer to that concern. In light of the very different purposes served by the exclusionary rule and the corroboration requirement, it would not have been improper for the court to rely on the suppressed physical evidence for the limited purpose of finding petitioner's confession to be sufficiently reliable to satisfy the corroboration rule.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1988

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* Although petitioner made those statements in support of his motion to suppress the marijuana, the district court was entitled to consider the statements after petitioner elected not to object to their admission into evidence at the trial on the merits. See *Simmons* v. *United States*, 390 U.S. 377, 394 (1968) (emphasis added) ("We * * * hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt *unless he makes no objection.*").

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60225

(3)

Supreme Court, U.S.
FILED
FEB 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-882

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WAYNE E. BARNES,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S BRIEF IN REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

THOMAS M. HAAS and
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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT I	1
ARGUMENT II	7
CERTIFICATE OF SERVICE . . .	9

TABLE OF AUTHORITIES

CASES	PAGE
Brown v. Illinois, 422 U.S. 590 (1975)	1,2,3
Lanier v. South Carolina, 474 U.S. 25 (1985)	5
Miranda v. Arizona, 384 U.S. 436 (1966)	1,2,3,5
Opper v. United States, 348 U.S. 84 (1954)	7
Rawlings v. Kentucky, 448 U.S. 98 (1980)	1,2,3,4
Smith v. United States, 348 U.S. 147 (1954)	7
United States v. Frady, 456 U.S. 152 (1982)	6
Wong Sun v. United States, 371 U.S. at 486 (1963)	3

CONSTITUTIONAL AUTHORITY

U.S. CONST. Amend. IV	2,3,5
U.S. CONST. Amend. V	2,5

ARGUMENT

I.

REPLY TO PARAGRAPH 2 OF THE GOVERNMENT'S MEMORANDUM IN OPPOSITION.

The Government argues that the Miranda[1] warning given to the Petitioner after his illegal detention by the police was sufficient to attenuate the taint of the detention, relying on Rawlings v. Kentucky, 448 U.S. 98 (1980). Rawlings and Brown v. Illinois, 422 U.S. 590 (1975) instruct that Miranda warnings are an important factor in determining whether a confession is obtained by exploitation of an illegal arrest, but not dispositive. Other factors to be considered are temporal proximity of the arrest and the

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1/ Miranda v. Arizona, 384 U.S. 436 (1966).

confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct, voluntariness being a threshold requirement.[2]

In Brown, the Court rejected establishment of a per se rule that Miranda warnings, in and of themselves, broke the causal chain so that any subsequent statement, even one induced by the continuing effects of unconstitutional custody, was admissible so long as the statement was found to be voluntary. The Court recognized that even if the statements were found to be voluntary under the Fifth Amendment, the Fourth Amendment issues remained so that

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[2/] Rawlings v. Kentucky, 448 U.S. at 107 (1980), citing Brown v. Illinois, 422 U.S. at 603-604 (1975).

a voluntary statement must, nevertheless, be "sufficiently an act of free will to purge the primary taint" in light of distinct policies and interests of the Fourth Amendment. Brown v. Illinois, 422 U.S. at 598-599, citing Wong Sun v. United States, 371 U.S. at 486 (1963).

The facts in Rawlings are demonstrably distinguishable from those in the instant case. In Rawlings after an illegal detention which lasted approximately 45 minutes, during which detention the police sought a search warrant, the police gave the Defendant his Miranda warning, and the Defendant claimed ownership of the contraband after an officer's command "to take what was his."

After the agent gave Barnes his Miranda warning, Barnes, according to Carter, made the statement, "I know you

can smell the marijuana because I do." Barnes disputed making this statement. (Pet., p. A-7). Carter claims to having smelled marijuana before this occurred. (Pet., p. A-6).

The Rawlings scenario involved the obtaining of a search warrant by the police, which is not the case here. Moreover, the detention in Rawlings was characterized by a "congenial atmosphere" in the house, and the Defendant's statement was a spontaneous declaration of ownership of the contraband. Barnes only made a full confession after questioning by the police, although the police claim that he made the statement, "I know you smell the marijuana because I do," during detention but before questioning.

It is significant that the District Court found the detention to be illegal because Carter did not have a particu-

larized and objective basis for suspecting Barnes of criminal activity, recognizing that a voluntary confession that satisfies Fifth Amendment standards is not sufficient to purge the taint of an illegal arrest. Lanier v. South Carolina, 474 U.S. 25 (1985). Because Barnes' confession to the police was derivative of the illegal detention of him by the police, and because the taint of this detention was not attenuated by any intervening circumstances, and certainly not by the Miranda warnings alone, the confession was due to be excluded.

Although counsel did not bring this constitutional defect to the Court's attention by a specific objection on constitutional grounds, he did make the Court aware of the derivative nature of the confession in violation of the Fourth and Fifth Amendments. (Pet., p.

20). In this case, the Court should recognize this error to prevent a miscarriage of justice. United States v. Frady, 456 U.S. 152 (1982). Moreover, this case does not prevent the typical plain error claim, where no showing was made by counsel to the Court by way of contemperaneous objection of a constitutional defect. The Court was certainly aware that the detention was unlawful, and counsel made the Court aware of this by stating, "I think his statement comes because he was illegally stopped and his truck searched, and as a result of that attempt he had been doing that morning, cooperating, he continued to cooperate later with Mr. Luker." (Pet., p. 21).

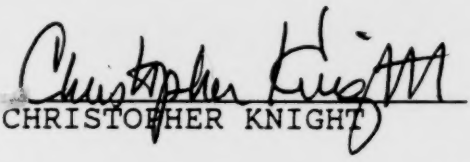
II.

REPLY TO PARAGRAPH 3 OF THE GOVERNMENT'S MEMORANDUM IN OPPOSITION.

The Petitioner submits that his "testimony" at the non-jury trial was, in fact, the very statment he made out-of-court to Deputy Luker upon which the Court based its judgment of conviction. (Pet., p. 16). This very admission cannot be used to bolster the admission under Opper v. United States, 348 U.S. 84 (1954); and Smith v. United States, 348 U.S. 147 (1954). Furthermore, petitioner did not elect not to object to the admission of his confession into evidence at the trial on the merits, but instead directed the Court's attention to the fact that the confession was derivative of the illegal search and detention. The reject should also reject the Government's contention that

evidence excluded on constitutional grounds can, nevertheless, be used to corroborate a confession. Certainly, the trier of fact is not allowed to consider such evidence in the Government's care-in-chief for any purpose.

Respectfully Submitted,



CHRISTOPHER KNIGHT

CERTIFICATE OF SERVICE

I, Christopher Knight, a member of the bar of this Court, do hereby certify that I have served a true and correct copy of this Reply Brief on Honorable Charles Fried, Solicitor General of the United States, by depositing three (3) copies of same in the United States mail at the United States Post Office at 250 Saint Joseph Street, Mobile, Alabama 36602, at approximately 2:00 P.M. on this 16th day of February, 1987, with sufficient postage affixed thereon to insure first class delivery.

Christopher Knight

CHRISTOPHER KNIGHT